

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

2151  
v. 3441

OVERTON THOMAS ANTHONY, )  
 )  
 Petitioner and Appellant, )  
 )  
 vs. )  
 )  
 C. J. FITZHARRIS, Superintendent, )  
 et al., )  
 )  
 Respondents and Appellees. )  
 )

No. 21646

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

JURISDICTION

Petitioner and appellant has invoked the jurisdiction of this Court under Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts

In an information filed by the District Attorney of Los Angeles County, petitioner was charged with two counts of kidnapping, two counts of forcible rape, and two counts of aiding and abetting forcible rape.

Appellant entered a plea of guilty to one count of forcible rape, namely, count three and on motion of the People, separate allegations charging that appellant



was armed were stricken from the count. Thereafter, appellant's motion to have this change of plea vacated and set aside was denied, and appellant was sentenced to the state prison on his plea of guilty to count three of the information and all other counts were dismissed (TR 86, 87). Appellant filed a timely notice of appeal on June 29, 1964. The California Court of Appeal, Second Appellate District, Los Angeles, California, affirmed the judgment on October 20, 1965, in an unpublished opinion, a copy of which was marked "Exhibit B" in respondent's return to the order to show cause.

Petitioner sought a hearing in the California Supreme Court and said petition was denied on December 22, 1965.

Petitioner has not sought habeas corpus relief in any state court in the State of California.

Petitioner's direct appeal to the California courts was limited to the sole question of whether the trial court had erred in not permitting him to withdraw his guilty plea under the provisions of California Penal Code section 1018.

#### B. Proceedings in the federal courts

On July 11, 1966, appellant filed a petition for a writ of habeas corpus in the United States Court for the Northern District of California (TR 1). On July





11, 1966, an order to show cause was issued, and on August 11, 1966, the court issued an order dismissing the petition for want of an indispensable party (TR 53). On October 11, 1966, the court issued an order vacating order dismissing petition of August 10, 1966, and for issuance of order to show cause (TR 54). On November 4, 1966, appellee, respondent below, filed an additional return to the order to show cause and points and authorities in opposition to habeas corpus (TR 76). On or about November 17, 1966, appellant filed a traverse (TR 94).

On December 21, 1966, Judge Zirpoli of the District Court filed his order denying the writ (TR 118).

Appellant filed a notice of appeal and on January 25, 1967, Judge Zirpoli granted leave to proceed in forma pauperis and issued a certificate of probable cause (TR 120, 121).

#### STATEMENT OF THE FACTS

An information was filed by the District Attorney of Los Angeles County charging petitioner with two counts of kidnapping, two counts of forcible rape, and two counts of aiding and abetting forcible rape (TR 79).

On March 31, 1964, petitioner appeared in court with his trial counsel, Crispus Wright. His counsel at



that time advised the court that petitioner wished to enter a new and different plea to count three of the information. The prosecutor then called petitioner's attention to his attorney's request and asked petitioner if he had discussed this matter with his counsel. Petitioner replied that he had. The prosecutor then inquired of petitioner and his co-defendant by asking the following questions:

"MR. CABALERO: All right. Has anyone made any promises to you of reward, probation, lesser sentence, immunity or any advantage whatsoever to be gained by you in pleading guilty?

"DEFENDANT JORDAN: No, sir.

"(Whereupon a discussion of the record ensued between the defendant Anthony and his counsel.)

"MR. WRIGHT: Well, of course, he is not referring to what the policemen say; it's what any attorney or anyone else offered you.

"MR. CABALERO: Well, Mr. Anthony, you understand that if you want to plead guilty to this charge, you will have to do this freely and voluntarily. Only you can do this. Do you understand that?



"DEFENDANT ANTHONY: Yes.

"MR. CABALERO: Now, has anyone at all -- and when I say 'anyone at all,' I mean you are not pleading guilty for any other reason other than for the fact that you are guilty; or are you pleading guilty because someone has promised you something or threatened you in any way?

"DEFENDANT ANTHONY: Well, I plead guilty.

"MR. CABALERO: Because you are in fact guilty, and for no other reason; is that correct?

"DEFENDANT ANTHONY: Yes, sir.

. . . . .

"MR. CABALERO: All right. Each of you understand that what your sentence will be, no one can tell you; that's entirely up to the judge in the case.

"Do you understand that?

"DEFENDANT JORDAN: Yes.

"DEFENDANT ANTHONY: Yes.

. . . . .

"MR. CABALERO: All right. Now, Mr. Anthony, to Count III of this Information charging you with the crime of rape, in violation of Section 261.4 of the Penal Code of



California, a felony, how do you plead?

"DEFENDANT ANTHONY: Guilty, sir." (TR 5, 6; Exh. B).

#### APPELLANT'S CONTENTIONS

Appellant filed a brief with this Court. In this brief appellant makes numerous, vague allegations and attempts to raise numerous issues which were not presented to Judge Zirpoli. Stated hereinbelow are the contentions raised by appellant in his petition for a writ of habeas corpus and which were considered by Judge Zirpoli:

1. The trial court abused its discretion under California Penal Code section 1018 by not allowing petitioner to withdraw his plea of guilty.
2. Misrepresentation by defendant's trial counsel.
3. Policemen at time of arrest violated defendant's constitutional rights under the Fifth, Sixth and Fourteenth Amendments.

#### SUMMARY OF RESPONDENT'S ARGUMENT

I. Appellant's plea of guilty was voluntarily made and the trial court did not abuse its discretion in denying appellant's motion to withdraw his plea of guilty.

II. A voluntary plea of guilty to the crime charged waives all defenses other than jurisdictional





defenses.

## ARGUMENT

### I

APPELLANT'S PLEA OF GUILTY WAS VOLUNTARILY MADE AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO WITHDRAW HIS PLEA OF GUILTY

As pointed out by Judge Zirpoli in his order denying the petition, the discretion of the trial court under California Penal Code section 1018 does not raise a federal question. Judge Zirpoli held that the allegations that the initial guilty plea was involuntarily made does raise a federal question, but that the record in the instant case indicates that the trial court thoroughly interrogated petitioner at the time he entered his guilty plea and based its refusal to allow withdrawal of a guilty plea on sound reasons. In his order Judge Zirpoli points out that the petitioner has had his day in court. The state court has held a hearing at the trial level on the voluntariness of petitioner's plea and had made written findings, which must be presumed to be correct. 28 U.S.C. § 2254(d), 62 Stat. 967 (November 7, 1966). The record shows that the trial court refused petitioner's request because the court was satisfied that petitioner's plea had been voluntarily made when entered, the story had been corroborated by



co-defendant Jordan, and petitioner was aware of the consequences of the plea, since he had been previously tried and acquitted on a similar offense when represented by the same trial counsel.

## II

### A VOLUNTARY PLEA OF GUILTY TO THE CRIME CHARGED WAIVES ALL DEFENSES OTHER THAN JURISDICTIONAL DEFENSES

In appellant's original petition for writ of habeas corpus, he contended that he was represented by inadequate counsel and was the subject of police beatings.

As pointed out by Judge Zirpoli, these statements made by petitioner were argumentative and not factual. Judge Zirpoli held that in view of the court's finding that his plea of guilty was voluntarily entered all defenses other than jurisdictional defenses have been waived. Thomas v. United States, 290 F.2d 696 (9th Cir. 1961).

It is respectfully submitted that Judge Zirpoli's finding in this respect is in accord with the case law on this subject and is dispositive of these issues.

### CONCLUSION

There being no merit in appellant's contentions, we respectfully request that the order denying the writ

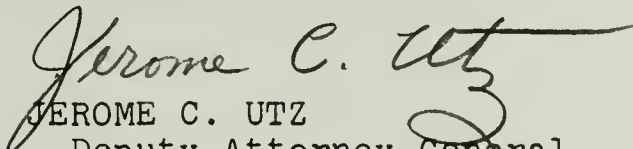


be affirmed.

Dated: June 12, 1967

THOMAS C. LYNCH, Attorney General  
of the State of California

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Deputy Attorney General

  
JEROME C. UTZ  
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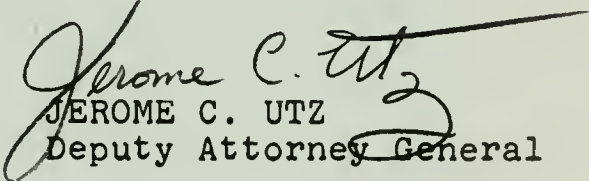
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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: June 12, 1967

  
JEROME C. UTZ  
Deputy Attorney General

MEMORANDUM

MEMORANDUM FOR THE RECORD  
SUBJECT: [Illegible]  
[Illegible text follows, including a date and possibly a reference number.]

[Illegible signature and name]